

Jeeram v National Union of Plantation Workers

HIGH COURT (ALOR SETAR) — ORIGINATING MOTION NO 25-11-1991
KC VOHRAH J
17 JUNE 1993

Arbitration — *Award — Setting aside — Misconduct of arbitrators by failing to determine all questions raised — Whether award improperly procured — Whether arbitrators' award was void — Arbitration Act 1952 s 24(2)*

Labour Law — *Trade unions — Applicant's nomination rejected by union — Application to court made before exhausting domestic remedies — Whether domestic remedies must be exhausted if tribunal had acted beyond jurisdiction and its decision was void — Trade Unions Act 1959 s 44*

The applicant was nominated for the post of chairman in one of the branches of the National Union of Plantation Workers ('the respondent union'). The applicant was later told that the respondent union had rejected the nomination of the applicant on the grounds that the applicant was not a member of the union and the applicant had ceased to be a member of the union as he had not paid his subscriptions. The dispute arising out of this was referred to arbitration and the applicant applied under O 69 r 2 (1) of the Rules of the High Court 1980 to set aside, under s 24(2) of the Arbitration Act 1952, the arbitration award on the grounds that the arbitrators had misconducted themselves and the award had been improperly procured. The respondent union contended, inter alia, that the application before the High Court was premature as the award was not final and the applicant was bound, under the union's rules, to appeal to the Triennial Delegates' Conference in accordance with r 32(5) of the Constitution & Rules of the National Union of Plantation Workers. The respondent also relied on s 44 of the Trade Unions Act 1959 which provides that every dispute between the parties shall be decided by the rules of the trade union.

Held, allowing the application:

- (1) The arbitrators had misconducted themselves within the meaning of s 24(2) of the Arbitration Act 1952 as they had failed to deal with the underlying issues, and the questions which were sought to be determined were left undetermined and it was unlikely that they would be able to untangle the underlying issues which were basically legal issues.
- (2) The so-called award of the arbitrators was void and the court had jurisdiction to entertain the application notwithstanding that the union's rules provided for an appeal to the Triennial Delegates' Conference and the applicant did not so appeal to that body.

A [Bahasa Malaysia summary]

Pemohon telah dicalonkan untuk jawatan pengerusi di dalam salah satu daripada cawangan Kesatuan Kebangsaan Pekerja-pekerja Ladang ('kesatuan responden'). Pemohon kemudiannya telah diberitahu bahawa pencalonannya telah ditolak oleh kesatuan responden atas alasan bahawa pemohon bukan seorang ahli kesatuan dan beliau tidak lagi menjadi ahli kerana beliau telah gagal membayar yuran kesatuan itu. Pertikaian yang timbul akibat daripada ini telah dirujuk untuk timbangtara dan pemohon membuat permohonan di bawah A 69 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk mengetepikan award timbangtara itu, di bawah s 24(2) Akta Timbangtara 1952, atas alasan salah laku penimbangtara dan bahawa award itu telah diperolehi secara tidak betul. Kesatuan responden menghujah, antara lain, bahawa permohonan kepada Mahkamah Tinggi itu adalah pramasa kerana award itu bukan award muktamad dan pemohon terikat, di bawah kaedah-kaedah kesatuan sekerja, untuk merayu kepada Triennial Delegates' Conference mengikut k 32(5) Perlembagaan dan Kaedah-Kaedah Kesatuan Kebangsaan Pekerja-Pekerja Ladang. Responden juga bergantung kepada s 44 Akta Kesatuan Sekerja 1959 yang memperuntukkan bahawa setiap pertikaian di antara pihak-pihak hendaklah diputuskan mengikut kaedah-kaedah kesatuan sekerja.

E Diputuskan, membenarkan permohonan itu:

- (1) Penimbangtara telah salah laku mengikut makna s 24(2) Akta Timbangtara 1952 kerana mereka telah gagal menghadapi isu-isu yang menjadi dasar, dan soalan-soalan yang perlu diselesaikan tidak diselesaikan dan adalah tidak mungkin bahawa mereka akan dapat menguraikan isu-isu yang menjadi dasar yang pada asasnya adalah isu-isu undang-undang.
- (2) Award yang telah dibuat oleh penimbangtara adalah tidak sah dan mahkamah mempunyai bidangkuasa untuk mendengar permohonan ini walaupun kaedah-kaedah kesatuan mengandungi peruntukan supaya rayuan dibuat kepada Triennial Delegates' Conference dan pemohon tidak membuat rayuan kepada badan itu.]

Notes

For cases on the setting aside of an arbitrators' award, see 1 *Mallal's Digest* (4th Ed) paras 590-604.

Cases referred to

- 1 *White & Ors v Kuzych* [1951] AC 585; [1951] 2 All ER 435; [1965] 2 WLR 579 (refd)
- 2 *Lawlor v Union of Post Office Workers* [1965] 1 All ER 353 (refd)
- 3 *Leigh v National Union of Railwaymen & Anor* [1969] 3 All ER 1249; [1970] 2 WLR 60 (refd)

- 4 *B Mahesan v KK Lim* [1987] 2 MLJ 160 (folld) A
 5 *Tharmalingam v Sambanthan* [1961] MLJ 63 (refd)
 6 *Bonsor v Musicians' Union* [1954] 1 All ER 822; [1954] 2 WLR 687 (folld)
 7 *Tan Toi Lan v Lai Kee Ying* [1975] 1 MLJ 27 (folld)
 8 *Official Assignee v Chartered Industries of Singapore Ltd* [1978] 2 MLJ 99 (folld) B

Legislation referred to

Trade Unions Act 1959 s 44

Thayalan Muniandy (Meena, Thayalan & Partners) for the applicant. C
B Lobo (Lobo & Associates) for the respondent.

Cur Adv Vult

KC Vohrah J: This is an application made pursuant to O 69 r 2(c) of the Rules of the High Court 1980 to set aside, under s 24(2) of the Arbitration Act 1952, an arbitration award which was made after a hearing on 14 July 1990 on the grounds that the arbitrators had misconducted themselves and that the award had been improperly procured. D

The respondent union is a trade union registered under the Trade Unions Act 1959 and caters to employees employed in the plantation industry. The respondent union has several state branch committees. One of the branches is the Kedah, Perlis, Penang state branch committee ('the branch committee'). E

Elections for all the posts in the Branch Committee for the term 1989–1992 were scheduled to be conducted between 1–21 July 1989. In early June 1989 among the nominations received for the post of chairman of the branch committee were six for one Jeeram Jayaraman of Batu Pekaka Estate (the applicant in this case). There were also seven nominations for one S Jayaraman of Batu Pekaka Estate and the applicant says 'Jayaraman' refers to himself. F

On 23 June 1989, the applicant was told that the respondent union had rejected the nomination of the applicant for the post of chairman of the branch committee. On 28 June 1989, the secretary of the branch committee, in response to a letter from the applicant's solicitor inquiring as to the reasons why the applicant's nomination had been rejected, stated that the respondent union was not aware that the applicant had been nominated for any post in the branch committee elections (see copy of letter marked 'J6' in encl 2). As it turned out, the respondent did indeed reject the nomination of the applicant for the post of chairman of the branch committee and the reasons given were that: G H

- (1) neither Jeeram Jayaraman of Batu Pekaka Estate nor S Jayaraman of Batu Pekaka Estate was a member of the respondent union; and I
- (2) the applicant had ceased to be a member of the respondent union as he had not been paying his subscriptions in accordance with the rules of the union.

A The dispute arising out of the respondent union's rejection of the applicant's nomination for the post of chairman in the branch committee in the 1989 election was referred to arbitration under r 32 of the Constitution and Rules of the National Union of Plantation Workers ('the Union Rules').

A complaint was filed by the applicant and the respondent union then put in a reply (see copies of the complaint and reply marked 'J2' in encl 2).

B On 14 July 1990, a panel of three arbitrators heard both parties. An undated document which was called an award ('the award') signed by two of the three arbitrators, was received on 9 March 1991 by the applicant (see a copy of the award marked 'J4' in encl 2). It is this award which the applicant seeks to set aside.

C Counsel for the respondent union has contended that the application before the court is premature as the award made by the arbitrators is not final and the applicant should exhaust his domestic remedies by appealing to the Triennial Delegates' Conference in accordance with r 32(5) of the Union Rules which states: 'There shall be a right of appeal to the Triennial Delegates' Conference whose decision shall be binding and conclusive ...'.

D Counsel argued that s 44 of the Trade Unions Act 1959 provides that every dispute between the parties mentioned in paras (a), (b) and (c) therein (which included the applicant and the respondent union) shall be decided in the manner directed by the rules of the trade union and that the applicant, being bound by his contract and the Union Rules, has not made his appeal in accordance with the Union Rules before coming to the High Court and the court should not entertain the application to set aside the award. He cited the Privy Council case of *White & Ors v Kuzych*¹ to support his contention. It is necessary, however, that the case should be seen in the correct perspective. I set out what Goff J (as he then was) stated in respect of that case and of another case, *Lawlor v Union of Post Office Workers*,² in the case of *Leigh v National Union of Railwaymen & Anor*,³ at p 1252:

Next it was submitted on behalf of the defendants that the plaintiff is not entitled to relief because he has not exhausted or indeed embarked on the domestic remedies afforded by the rules. On this point I extract from *White v Kuzych* in the Privy Council and *Lawlor v Union of Post Office Workers*, in this court, two propositions. *The first is that even where there is an express provision in the rules that the plaintiff must first exhaust his domestic remedies the court is not absolutely bound by that because its jurisdiction cannot be ousted, but the plaintiff will have to show cause why it should interfere with the contractual position.* This is consonant with the rule in the case of a submission to arbitration where the court always has a discretion whether to stay an action but cause must be shown why it should not. The second is largely the converse of the first, namely that in the absence of such a provision the court can readily, or at all events more readily, grant relief without prior recourse to the domestic remedies but may require the plaintiff to resort first to those remedies... (Emphasis added.)

I Then again in Malaysia it has been held that where a domestic tribunal has acted beyond its jurisdiction and its decision is void, the party aggrieved should not be required to exhaust his domestic remedies before coming to court. So opined Mohamed Azmi SCJ in a majority opinion in *B Mahesan v KK Lim*,¹ where his Lordship had the opportunity to consider *White v*

*Kuzych*¹ together with *Tharmalingam v Sambanthan*⁵ and *Bonsor v Musicians' Union*,⁶ at p 163: A

This distinction between a domestic tribunal acting within and acting without jurisdiction is recognized by the Privy Council in *White v Kuzych* and also by Thomson CJ in *Tharmalingam v Sambanthan*. Without providing an answer, the Privy Council posed the following question at p 598: '... is the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, appealable, or, on the contrary, is it simply void and thus not subject to appeal at all?' There is no necessity to deal with that question in this appeal, since the disciplinary committee had acted beyond its jurisdiction and its decision was void, and as such the appellant should not be required to exhaust his domestic remedies before coming to court. In similar circumstances in *Bonsor v Musicians' Union* Sir Raymond Evershed MR said at p 825: B C

'It is true that the plaintiff did not take advantage of his right of appeal under the rules, but I cannot see how that affects the plaintiff's right to come to this court and say that the purported expulsion was ultra vires the rules and ineffective.' D

In my view, the applicant has shown that the so-called award made by the arbitrators is void (and in the following paragraphs I will discuss why I think that is so) and therefore, the court has jurisdiction to entertain the application notwithstanding that the Union Rules provide for an appeal to the Triennial Delegates' Conference and the applicant did not so appeal to that body. E

Before I go further, I think it is necessary to note that earlier in 1988, the applicant had had a dispute with the respondent union which was referred by consent of both parties to a government officer, the penolong pendaftar kesatuan sekerja, under s 44 of the Trade Unions Act 1959. The dispute was whether the membership of the applicant in the respondent union had been terminated as claimed by the respondent union. The arbitrator held on 9 November 1988 that the termination of the applicant's membership in the respondent union was 'ultra vires and void'. The respondent union applied to the High Court, Penang to set aside the award but on a preliminary objection as to time-bar, the application was dismissed. F

I now come back to the dispute which was referred to the panel of three arbitrators. The applicant raised two issues for determination by the arbitrators and the arbitrators were clearly aware of the two issues which they had to determine as shown at p 1 of their award where they state: G

The complainant has in his statement of complaint dated 4 April 1990 prayed for the following: H

- (i) a determination that the rejection of the complainant's nomination for the post of chairman for the 1989 branch committee election was wrongful; and
- (ii) a determination that the complainant's nomination be accepted.

There is a reference to a prayer 'for such or other relief as deemed fit' but that is not relevant in this case. I

Counsel for the applicant relies on s 24 of the Arbitration Act 1952 to say that the award of the arbitrators should be set aside. He refers specifically to s 24(2) which reads:

- A Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitrator or award has been improperly procured, the High Court may set the award aside.

The whole of s 24 of the Malaysian Arbitration Act 1952 is in *pari materia* with s 23 of the English Arbitration Act 1950. In 2 *Halsbury's Laws* (4th Ed)

- B 400 there is a comment relating to the grounds for remission or setting aside awards, appearing at para 692, which reads (I am leaving out the footnotes):

There are five broad grounds on which awards have been remitted to the reconsideration of the arbitrator or umpire or have been set aside. They are the following:

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- (1) that the arbitrator or umpire has misconducted himself or the proceedings;
 - (2) that there is some defect or error patent on the face of the award, as for example, where the award is uncertain or incomplete;

As to the instances of misconduct, this is what is stated at p 402, para 694 (again I omit the footnotes):

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- Misconduct has been found in the following instances, some of which would also give the court jurisdiction to intervene on other grounds: (1) *where the arbitrator or umpire fails to decide all the matters which were referred to him*; (2) ... ; (3) where the award is uncertain, ... (Emphasis added.)

- E In *Tan Toi Lan v Lai Kee Ying*,⁷ when an arbitrator merely ordered 'I dismiss the claim' where four questions were posed to him relating to whether a deceased person who died in an accident was a workman as defined under the Workmen's Compensation Ordinance 1952, whether the accident arose out of employment, whether compensation was payable and whether the defendant should pay the compensation, it was the view of
- F Wan Sulaiman J (as he then was) that if the query, whether the arbitrator had answered the four questions posed to the arbitrator, had been properly brought before the court, he (ie Wan Sulaiman J) had no doubt the award of the arbitrator would have been set aside as the award was uncertain as
- G three questions were not answered and at best only one question was answered. It was an obiter statement but the principle stated is sound.

In a Singapore case, *Official Assignee v Chartered Industries of Singapore Ltd*,⁸ Chua J had this to say about an award of an arbitrator at p 100:

- H It is obvious looking at the award that the arbitrator failed to decide on all the matters or issues referred to him. In particular he failed to decide the very questions submitted to him whether or not the notice of 16 April and the termination of the agreement on 30 April 1970, by CIS were unlawful and void as claimed by GCC. The arbitrator should have stated in his award whether the notice and the termination of the agreement were good or bad. The award is clearly defective and therefore void. I do not see any means of avoiding the consequence, which is, that the award must be set aside.

- I Chua J also found the award void on another ground: 'But I think the award is also defective and therefore void, on account of the award being ambiguous'.

Now, although in this case two questions were raised for determination by the parties, and the arbitrators took cognizance of them, the arbitrators did not at all determine the issues raised.

I have gone through the document exhibited as 'J4' in encl 2 in this case, which the arbitrators have called an award. However, I have not been able to find anything resembling a determination of the questions raised or an award. There is in fact no decision made on any matter. What the document contains is what the arbitrators in the document call at p 6 'findings of facts'. They are set out below in full:

After hearing both parties on 14 July 1990 and taking into consideration the evidence and submission submitted by both parties, the arbitrators made the following findings of facts:

- (1) The complaint arises in the months of May and June 1989 in the process of election of office bearers for the 9th Triennial Representatives' Conference for the Kedah, Perlis and Penang State Branch of NUPW.
- (2) Nominations for the post of chairman of the branch committee were sent out on 29 May 1989 and the closing date was 12 June 1989.
- (3) There were nominations received in the names of S Jayaraman and Jeeram Jayaraman of Batu Pekaka Estate for the post of chairman.
- (4) The complainant claimed that these nominations refer to him. The respondent referred to the membership register and showed that neither S Jayaraman nor Jeeram Jayaraman was a member from Batu Pekaka Estate.
- (5) The complainant admitted that he had ceased employment from Batu Pekaka Estate wef 10 November 1986. He admitted that he was employed in Vengadasalam Estate at the time of the nominations.
- (6) The complainant claimed that he was a member in benefit at the time of the nominations. He produced an arbitrator's award by Mr Siow Kok Leung dated 9 November 1988 and an order of the High Court of Malaya at Penang (Originating Motion No 25-5-1989) dated 21 June 1990 and correspondence between the complainant and the respondent and his solicitors and the respondent as evidence of his status of membership. The respondent stated that the arbitrator's award was in relation to a dispute arising out of the termination of the complainant's membership and the High Court order was the result of the appeal on that matter which was dismissed without being heard because of the delay in the filing of the appeal by the respondent's solicitors. The respondent also stated that payment of subscriptions must comply with r 18 of the NUPW Constitution and Rules. There were no provisions for accepting subscriptions otherwise and amendments to the Constitution providing for appointment of the secretary at the estate level for collection of subscriptions where there were less than 20 members was approved and came into force wef 22 May 1989. As at May 1989, the complainant had attempted to pay his subscriptions directly but the respondent had not accepted the subscriptions as his procedure of payments was 'ultra vires' the Constitution and the Rules of the NUPW. The complainant's subscriptions had not been accepted by the respondent since March 1988. As at May 1989, the complainant had not paid his subscriptions for 15 months in compliance with the Constitution and Rules of NUPW.
- (7) At the state committee meeting held on 10 June 1990, the state committee rejected the nominations of S Jayaraman and Jeeram Jayaraman of the Batu Pekaka Estate as there was no such member in the membership register of

- A Batu Pekaka Estate. The respondent produced the nomination forms to show that the nominations in the names received did not appear in the membership register of Batu Pekaka Estate.

The so-called findings of fact, seven paragraphs of them, merely narrate in summary form the submissions and the evidence adduced on behalf of both parties which had been mostly set out, also in summary form, in the previous five pages of the document. Thus what was narrated in the seven paragraphs relate to the claims of the applicant and the claims of the respondent union in respect of the nomination of the applicant for the post of chairman of the branch committee; the reasons which the applicant advanced for his eligibility to be nominated which included reference to the earlier arbitrator's award dated 9 November 1988, the rejection of the nomination and the reasons advanced by the respondent union which included reference to the fact that the arbitrator's award went up to the High Court on appeal but was rejected because the appeal was filed late. Reference was also made to the claim by the respondent union that payment of subscriptions (which the union headquarters in Kuala Lumpur refused to collect although tendered) must comply with r 18 of the Union Rules and that the applicant as at May 1989 had not paid his subscriptions for 15 months and that on 10 June 1990, the state committee rejected the nomination of the applicant as there was no such member in the membership register of Batu Pekaka Estate.

E The narration in short merely sets down a gist of claims and opposing claims but there was no determination of the issues raised by the applicant. It is not surprising that the arbitrators did not determine the issues as they had not come to grips with the underlying questions relating to the legal effect of the earlier arbitrator's award and the legal effect of the Union Rules relating to payment of subscriptions and the refusal of the respondent union to accept the fees tendered by the applicant to the respondent union's headquarters. These underlying questions are by no means easy questions of law and they were not dealt with. Thus, the question whether the rejection of the applicant's nomination for the post of chairman for the 1989 election of the branch committee was wrongful could not and was not determined. Nor was the question whether the applicant's nomination should have been accepted determined. There were no answers and there were no conclusions drawn by the arbitrators in relation to the two questions and therefore they had miscondacted themselves within the meaning of s 24(2) of the Arbitration Act 1952; the so-called award is void.

H As regards the issue raised by counsel for the applicant that the award was improperly procured because the arbitrators had ignored the award of the first arbitrator made on 9 November 1988, I have already touched on that; the issue does not arise as although the arbitrators mentioned the said award, they did not make any decision on its effect on the applicant's eligibility to be nominated.

I I have considered whether I should remit this matter to the arbitrators (it would appear that only two of them made the award) to reconsider the matter and my view is that I should not, as the arbitrators have miscondacted themselves within the meaning of s 24(2) of the Arbitration Act 1952 and

it would be pointless to do so; they have failed to deal with the underlying issues and the questions which were sought to be determined were left undetermined and it is unlikely they will be able to untangle the underlying issues which are basically legal issues. The so-called award is void and I set it aside. The respondent union will pay the costs of this application.

Application allowed.

Reported by Blanche Oleary

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